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No. 88-865

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

SUN EXPLORATION AND PRODUCTION COMPANY, ET AL., PETITIONERS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal government's decision to issue onshore oil and gas leases for lands in two national forests constituted a "recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment," within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), which requires the preparation of an environmental impact statement to accompany such a proposal.

2. Whether Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536 (1982 & Supp. IV 1986), which requires each federal agency to consult with the Secretary of the Interior to ensure that any action by the agency is not likely to jeopardize any endangered or threatened species, or destroy its critical habitat, permits such consultation on an incremental basis provided that it is completed prior to any irreversible and irretrievable commitment of resources.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Best v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) 17
Cabinet Mountains Wilderness v. *Peterson*, 685 F.2d 678 (D.C. Cir. 1982) 17
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 13
Metropolitan Edison Co. v. *People Against Nuclear Energy*, 460 U.S. 766 (1983) 13
North Slope Borough v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) 9, 17, 18
Park County Resources Council v. *United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987) 10, 11, 17
Secretary of the Interior v. *California*, 464 U.S. 312 (1984) 17
Sierra Club v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) 9-10, 11
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 13
Village of False Pass v. *Clark*, 733 F.2d 605 (9th Cir. 1984) 8-9, 17

Statutes:

Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*:
§ 7, 16 U.S.C. 1536 (1982 & Supp. IV 1986) 2, 5, 14, 15
§ 7(a)(2), 16 U.S.C. 1536(a)(2) 15
§ 7(b)(3)(A), 16 U.S.C. 1536(b)(3)(A) 3, 15
§ 7(c)(1), 16 U.S.C. 1536(c)(1) 15
§ 7(d), 16 U.S.C. 1536(d) 15, 16

Statutes—Continued: Page

Federal Land Policy and Management Act of 1976, 43 U.S.C. 1712(c)(2) 13
Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, § 5102, 101 Stat. 1330-256 ..... 3-4, 14
Mineral Leasing Act, 30 U.S.C. 181 *et seq.* 2, 9, 17
30 U.S.C. 226(b)-(c) 3
National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. 4332(2)(C) 2
National Forest Management Act of 1976, 16 U.S.C. 1604(b) 13
Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* 9, 17
Wilderness Act, 16 U.S.C. 1131 *et seq.* 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 848 F.2d 1441. The opinion of the district court (Pet. App. B1-B5) is reported at 605 F. Supp. 107.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1988. A petition for rehearing was denied on July 27, 1988. On October 18, 1988, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to November 24, 1988. The petition was filed on November 25, 1988 (November 24th was a holiday). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Mineral Leasing Act, 30 U.S.C. 181 *et seq.*, authorizes the Secretary of the Interior to issue oil and gas leases and other mineral leases for federal lands. The Secretary conducts this leasing program primarily through the Bureau of Land Management (BLM) of the Department of the Interior. Mineral leasing decisions regarding national forest lands have been made in consultation with the Department of Agriculture's Forest Service, which is generally responsible for management of the national forests (Pet. App. A3 n.3). When mineral leasing on national forest lands has been proposed, BLM and the Forest Service have agreed that the Forest Service is the lead agency responsible for ensuring compliance with Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), which requires preparation of an environmental impact statement (EIS) for inclusion "in every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment * * *."

BLM and the Forest Service have also agreed that the Forest Service is the lead agency responsible for ensuring compliance with Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536 (1982 & Supp. IV 1986), which requires each federal agency to consult with the Secretary of the Interior to ensure that any action taken by the agency is not likely to jeopardize any endangered or threatened species, or destroy its critical habitat.[1] If the Forest Service determines that a threatened or endangered species is likely to be adversely affected, the Secretary

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[1] The Secretary of the Interior, acting through the Fish and Wildlife Service, generally has jurisdiction over nonmarine species, while the Secretary of Commerce, acting through the National Marine Fisheries Service, has jurisdiction over marine species.

must prepare a written "biological opinion" detailing how the agency action will adversely affect the species or its critical habitat (see 16 U.S.C. 1536(b)(3)(A)).

Based on the results of the NEPA and ESA inquiries, the Forest Service has been recommending to BLM whether the leases should be issued and, if issued, what conditions they should contain to protect against environmental harm. BLM, however, has retained ultimate authority to decide for itself whether to issue a mineral lease. Pet. App. A3 n.3.[2]

Prior to 1981, BLM had received numerous noncompetitive oil and gas lease applications for lands within the Flathead and Gallatin National Forests in Montana (Pet. App. A3).[3] The Forest Service accordingly prepared for

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[2] Since the leases challenged in this case were issued, however, Congress enacted the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, § 5102, 101 Stat. 1330-256, 1330-257 (emphasis added), which amends the Mineral Leasing Act to provide that "[t]he Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture" and that:

> The Secretary of the Interior, *or for National Forest Lands, the Secretary of Agriculture,* shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources. No permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering proposed surface-disturbing activities, within the lease area.

[3] There are two classes of federal onshore oil and gas leases: competitive and noncompetitive leases. Under the Mineral Leasing Act as it existed in 1981, lands within boundaries of "known geological structures of a producing oil or gas field" outside Alaska were leased by competitive bid, if at all, and all other lands were leased noncompetitively, if at all, to the first qualified applicant. See 30 U.S.C. 226(b)-(c). The Federal Onshore Oil and Gas Leasing Reform Act of

each forest an "environmental assessment" (EA) regarding the potential environmental impacts of the proposed leasing on the forest. In each EA, the Forest Service recommended in favor of leasing. Based upon the EAs, the Forest Service also concluded that an EIS need not be prepared prior to leasing because the leasing itself would have no significant environmental impact (*ibid.*).

The Forest Service rested its negative determination largely on its recommendation that the leases contain standard and special stipulations restricting the lessee's right to engage in certain kinds of activities without prior agency approval. These stipulations would include, among others: (1) a No Surface Occupancy (NSO) stipulation, prohibiting lessees from occupying or using the surface of the leased land without further specific approval from BLM (Pet. App. A4, A10-A11); (2) a Surface Disturbance stipulation, prohibiting a lessee from undertaking a surface disturbing activity until after it has requested and received BLM's approval of the nature and location of the activity, and authorizing BLM to impose on the lessee "reasonable conditions, not inconsistent with the purposes for which th[e] lease is issued, * * * to protect the surface of the leased lands and the environment" (*id.* at A4, A16-A17 (emphasis omitted)); and (3) a Threatened and Endangered Species (T&E) stipulation, generally authorizing the federal government to preclude absolutely any activity likely to jeopardize a protected species (see *id.* at A27-A28). The EAs contemplated that NSO stipulations would be included only in leases for forest lands with distinctive surface resource values needing special protections. The Surface Disturbance Stipulation and the T&E

1987, however, generally requires that federal lands be initially offered at a competitive lease sale.

Stipulation would be included in every lease.[4]

Pursuant to the ESA, the Forest Service also conducted, for both national forests, a biological evaluation of the effects of the proposed oil and gas leasing on threatened and endangered species (Pet. App. A22 & n.28). The Forest Service's evaluations concluded that because of lease stipulations, including the T&E stipulation, the issuance of the leases would itself have "no effect" on any of the four threatened or endangered species known to be in the two national forests. As required by Section 7 of the ESA, 16 U.S.C. 1536 (1982 & Supp. IV 1986), the Forest Service then formally consulted with the Department of the Interior's Fish and Wildlife Service, which issued two biological opinions that similarly concluded that the leases, as conditioned, would not themselves likely jeopardize the existence of any of the four species (Pet. App. A4-A5, A22). The two opinions also concluded that a biological opinion on matters beyond the effects of leasing itself was not appropriate at this initial stage because there was insufficient information regarding post-leasing activities (*ibid.*).

BLM subsequently issued slightly more than 700 leases for oil and gas exploration, development, and production on approximately 1.3 million acres within the two national forests (Pet. App. A4). All of the leases contain the Surface Disturbance stipulation and the T&E stipulation (*id.* at A4, A27-A28). Fifty-seven of the leases were said by the court of appeals to be entirely covered by an NSO stipu-

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[4] The EAs also proposed the use, where appropriate, of special surface occupancy restriction stipulations (as to both timing and location), road use stipulations restricting the use of access roads to specified purposes only, stipulations authorizing the agencies to require a lessee to coordinate its activities with the activities of other lessees, and limited surface use stipulations. See Pet. App. A15.

lation[5] and approximately 500 additional leases contain NSO stipulations covering a portion of the leased premises (*id.* at A11).

2. Following unsuccessful administrative challenges to the issuance of the leases (Pet. App. A5), respondents James R. Conner, the Montana Wildlife Federation, and the Madison-Gallatin Alliance (collectively referred to as respondent Conner) brought this lawsuit against the federal respondents in the United States District Court for the District of Montana. Respondent Conner alleged, inter alia, that the federal respondents' failure to prepare an EIS violated NEPA and their failure to prepare a biological opinion regarding all aspects of onshore oil and gas exploration, production, and development, violated the ESA.

The district court granted summary judgment in favor of respondent Conner (Pet. App. B1-B5). The court concluded that the decision not to prepare an EIS was unreasonable because leases without NSO stipulations "fail to ensure that environmentally damaging activity can be precluded by the federal agency" (*id.* at B3). The court concluded that an EIS was likewise required for leases with NSO stipulations because "[t]o use the NSO stipulation as a mechanism to avoid an EIS when issuing numerous leases on potential wilderness areas circumvents the spirit of NEPA" (*id.* at B3-B4). Finally, the court concluded that the federal respondents had violated the ESA "by failing to analyze the consequences of all stages of oil and gas activity on the forests" (*id.* at B5).

Following entry of the district court's order, petitioners, which include numerous lessees, their assignees, and their designated operators, moved to intervene as necessary

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[5] A more recent Forest Service survey indicates that the number of such leases actually appears to be only 47.

parties and also moved for relief from the court's order. The district court denied petitioners' request that it reopen its proceedings, but granted their motions to intervene for the limited purpose of allowing them to appeal. Pet. App. A6.

3. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A48). The court agreed with petitioners and the federal respondents that the sale of an NSO lease is not an irreversible commitment of resources requiring the preparation of an EIS (*id.* at A10-A14), but agreed with respondent Conner that the sale of non-NSO leases can require an EIS because it can represent just such an irreversible resource commitment (*id.* at A14-A20). Although, the court explained, the "mitigation stipulations in non-NSO leases permit reasonable regulation of surface-disturbing activities to reduce their impact on the environment," the stipulation limits such regulation to that which is "not inconsistent" with oil and gas development and production (*id.* at A14-A17). Because, the court elaborated, "it would clearly be inconsistent with the purpose of the lease if the government prevented all drilling, roadbuilding, pipe-laying, and other lease-related surface-disturbing activities," which "are likely, if not certain, to significantly affect the environment," there is "serious[ ] question * * * whether the ability to subject such highly intrusive activities to reasonable regulation can reduce their effects to insignificance" (*id.* at A17-A18).

The court of appeals rejected the government's proffered distinction, not made by petitioners, between roadless and nonroadless areas of national forests,[6] "find[ing] nothing in the record to show that the mere fact that a

[6] The federal respondents, unlike petitioners, did not challenge the district court's ruling to the extent that it applied to non-NSO leases of "roadless" areas of the two forests (see Pet. App. A7 n.11).

parcel of national forest land is 'roaded' renders the environmental impact [of] oil and gas activities insignificant" (Pet. App. A14 n.17). The court also rejected the government's contention that an EIS was impracticable at the leasing stage because meaningful predictions could not then be made regarding the size, location, and timing of oil and gas production and development (*id.* at A18-A19). According to the court, "the option of selling NSO leases rather than non-NSO leases provides a reasonable alternative approach for oil and gas leasing in the face of uncertainty" (*id.* at A19).

Finally, the court of appeals affirmed the district court's ESA ruling (Pet. App. A21-A35). The court ruled "that the [Fish and Wildlife Service] violated the ESA by failing to use the best information available to prepare comprehensive biological opinions considering all stages of the agency action, and thus failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species, as required by section 7(a)(2)" (*id.* at A27). According to the court of appeals, "agency action in this case entails not only leasing but leasing and all post-leasing activities through production and abandonment" (*id.* at A24) and "incomplete information about post-leasing activities does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available" (*id.* at A25). The court also specifically rejected the government's contention that biological opinions could take an "incremental" approach when, as in this case, the issued leases included a T&E stipulation empowering the agency to preclude any lessee activity likely to jeopardize a species (*id.* at A27-A35). The court held that "T&E stipulations cannot be substituted for comprehensive biological opinions" (*id.* at A35). The court also distinguished this case from *Village of False*

Pass v. *Clark*, 733 F.2d 605 (9th Cir. 1984), and *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980), on the ground that an incremental approach was appropriate in those cases because the leasing in those cases was under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, which, unlike the Mineral Leasing Act, establishes a segmented approach to mineral leasing that "mitigate[s] the ESA requirement that the biological opinion address all phases of the mineral leasing project" (Pet. App. A29-A33).

Judge Wallace dissented on the ESA issue only (Pet. App. A45-A48). He concluded that the court's prior decision in "*False Pass* controls this case and it mandates the result opposite to the one the majority reaches" (*id.* at A45). Because of the T&E stipulation, the dissent argued, "the leasing stage under the terms of the leases before us is as discrete a stage as that mandated by the OCSLA" (*id.* at A46).

ARGUMENT

We agree with petitioners that the decision below was incorrect. Unlike petitioners, however, we do not believe that the court of appeals' decision clearly conflicts with a decision of another court of appeals. In addition, the practical significance of the court's NEPA and ESA rulings remains uncertain and can be more accurately assessed after the relevant federal agencies have sought to comply with those rulings and the lower courts have evaluated their efforts. Because further review at this time would therefore be premature, the petition for a writ of certiorari should be denied.

1. Contrary to petitioners' claim (Pet. 7-17), neither the NEPA ruling of the court of appeals in this case nor that of the District of Columbia Circuit in *Sierra Club* v.

Peterson, 717 F.2d 1409 (1983), irreconcilably conflicts with the Tenth Circuit's decision in *Park County Resources Council* v. *United States Department of Agriculture*, 817 F.2d 609 (1987). Although the courts in this case and in *Sierra Club* concluded that an EIS was required, while the court in *Park County* concluded that an EIS was not required, the different results reflect the very different facts present in the cases and do not necessarily mean that the courts applied fundamentally different views of the requirements of NEPA.

Specifically, the court in *Park County* rejected the plaintiffs' argument in that case that the issuance of an oil and gas lease of national forest land "always constitutes a major federal action significantly affecting the quality of the human environment under NEPA" and then found, based on the record in that case, that the "plaintiffs failed to meet their burden" of establishing that the agency acted unreasonably in declining to prepare an EIS (817 F.2d at 620-622). The court did not rule that the issuance of onshore oil and gas leases of national forest lands never requires preparation of an EIS. Instead, as the court of appeals itself made clear (*id.* at 623), it was "merely hold[ing] that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry." [7]

Nor, conversely, do we read either the Ninth Circuit's decision in this case or the District of Columbia Circuit's decision in *Sierra Club* v. *Peterson* as resting on the absolutist position that the issuance of an oil and gas lease for national forest lands always requires an EIS. Each in-

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[7] At the time of the court of appeals' decision in *Park County*, the lessee was reserving its right to seek approval to drill an additional well in the future, but the lessee had already abandoned its one drilling effort and had completed its reclamation work at that site (817 F.2d at 615). An EIS had also already been prepared prior to permitting any exploratory drilling at the site (*id.* at 613, 622).

stead rests on the court's evaluation of the record in the case, including the quality and quantity of land to be leased, and the court's determination that the plaintiffs had succeeded in establishing the unreasonableness of the federal agencies' failure to prepare an EIS in the particular circumstances. This case, for example, involves the issuance of more than 700 oil and gas leases encompassing more than 1.3 million acres, which the court of appeals described as "vast and beautiful national forests" with "a vast tract of rugged mountainous wilderness," "exceptionally pure surface water, prized for trout fishing," and an "undisturbed ecosystem" that "supports abundant fish and wildlife populations" (Pet. App. A2). While *Peterson* did not involve a comparable quantity of national forest land – only 28,000 acres were leased without NSO stipulations – the lands leased in *Peterson,* unlike any of the lands at issue in *Park County,*[8] were within a 247,000-acre roadless area that the Forest Service had designated as a "further planning area," the wilderness attributes of which should be preserved pending completion of a study of the lands for possible "wilderness" designation under the Wilderness Act, 16 U.S.C. 1131 *et seq.* See 717 F.2d at 1410-1411.

Indeed, unlike petitioners, the federal respondents have not disputed the obvious significance of the ecological character of the leased lands in determining whether an EIS must be prepared. We did not challenge in the court of appeals the district court's ruling to the extent that it applied to non-NSO leases of roadless areas within the two national forests (see Pet. App. A7 n.11). We instead ad-

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[8] The plaintiffs in *Park County* were challenging only a single lease, encompassing approximately 10,000 acres, none of which had ever "been designated a wilderness, wilderness study, park, or other restricted-use lands" (817 F.2d at 612-613 & n.1; see *id.* at 622).

vised the appellate court that the Forest Service was preparing a separate EIS for the roadless areas in both national forests in order to determine the proper disposition of those properties (*ibid.*). Hence, our disagreement with the court of appeals is confined to that court's refusal to accept our view that because the nonroadless areas are less ecologically pristine, the issuance of non-NSO leases of those areas will not cause significant environmental harm (*id.* at A14 n.17). We continue to believe that the court of appeals' decision is erroneous for that reason,[9] but we cannot conclude at this time that its ruling is based on a reading of NEPA that is fundamentally at odds with that applied by the Tenth Circuit in *Park County*.

Finally, we also do not share petitioners' view of the need for this Court's immediate review of the court of appeals' ruling. We have already decided to prepare an EIS that discusses the proper disposition of the roadless areas—which cover approximately one-half of the leased area—and we cannot adequately evaluate the practical significance of the ruling with regard to nonroadless areas until after we have had an opportunity on remand to make a good faith effort at complying with the court's ruling. We do not even yet know the precise amount of lands covered by the ruling because, unlike the district court, the court of appeals did not require the preparation of an EIS for those lands covered by NSO stipulations and, as the court of appeals acknowledged (Pet. App. A11), "only 57 [leases] are governed by NSO stipulations in their entirety, but around 500 leases contain NSO stipulations covering a

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[9] The court of appeals never identified the nature of the significant environmental impacts it presumed would occur; nor did the court otherwise explain why the leasing would have significant environmental impacts, notwithstanding the lease stipulations.

portion of the leased property." [10]

Nor, for those lands not covered by NSO leases, do we yet know how much additional work will be required to prepare an adequate EIS. Each EA is already a significant document and an EIS at the leasing stage will necessarily be limited by "the inexactedness of all predictive ventures" (*Kleppe* v. *Sierra Club*, 427 U.S. 390, 402 n.14 (1976)). In addition, as petitioners acknowledge (Pet. 3 n.2), pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1712(c)(2), and the National Forest Management Act of 1976, 16 U.S.C. 1604(b), the federal respondents are already engaged in the preparation of detailed land management plans to be accompanied by environmental impact statements for all lands within their respective jurisdictions. In the long run, therefore, the NEPA requirements announced in this case may ultimately prove to be only overlapping in nature, substantially diminishing their practical significance.

To be sure, the court of appeals' ruling in this case may ultimately prove unmanageable, particularly if the lower courts wrongly insist on the inclusion of information concerning future oil and gas development and its environmental effect that cannot be known at the leasing stage. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983), quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) ("The scope of the agency's inquiries must remain manageable if NEPA's goal of 'insur[ing] a fully informed and well-considered decision' is to be accomplished."). If that happens, we may at that time seek this Court's review of the NEPA

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[10] The court of appeals remanded with instructions for the district court to "determine which leases are in fact NSO leases within the meaning of this opinion" (Pet. App. A11 n.15). See also note 5, *supra*.

question. Until, however, we have made the initial effort necessary to comply with the court of appeals' ruling and had that effort evaluated by the lower courts, we believe that further review by this Court would be premature.[11]

2. We agree with petitioners that the court of appeals also misconstrued Section 7 of the ESA, which requires that every federal agency, in consultation with the Secretary of the Interior, ensure that its actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat (see 16 U.S.C. 1536 (1982 & Supp. IV 1986)). Contrary to the court of appeals' ruling (Pet. App. A28), Section 7 does not contain a "clear mandate" requiring the preparation *at the leasing stage* of a biological opinion regarding all stages of oil and gas exploration, development, and production even where, as in this case, the lease includes a T&E stipulation, expressly empowering the federal lessor to prevent any future activities likely to harm threatened and endangered species.

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[11] Subsequent regulatory developments may also diminish the practical significance of the court of appeals' NEPA ruling. In light of the Federal Onshore Oil and Gas Reform Act of 1987 (see note 2, *supra*), the Secretary of Agriculture has scheduled for publication in Part 6 of the Federal Register on January 23, 1989, proposed regulations that require all oil and gas leases issued for National Forest lands to stipulate that "[t]he Secretary of Agriculture retains the authority under this lease to preclude all operations on a leasehold where analyses of the environment indicate such action is appropriate." If finally adopted as proposed, Agriculture's regulation would change the regulatory setting substantially from that addressed by the court of appeals here.

Under Section 7, an agency proposing to take an action must inquire of the Secretary whether any threatened or endangered species "may be present in the area of the proposed action" (see 16 U.S.C. 1536(c)(1)). If the Secretary responds that one or more such species may be present, then the agency must prepare a "biological assessment" to determine whether any such species is "likely to be affected" by the action (*ibid.*). Finally, if, as in this case, the agency determines that such an effect is likely, it must formally consult with the Secretary, who must prepare a written biological opinion "detailing how the agency action affects the species or its critical habitat" (16 U.S.C. 1536(b)(3)(A)). Whenever the Secretary finds "jeopardy or adverse modification [of habitat]," the Act requires the Secretary to "suggest those reasonable and prudent alternatives" that he believes the federal agency can take in implementing the agency action without violating subsection (a)(2)'s prohibition on action "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species" (*ibid.*).

Section 7 bars, however, only two types of action: (1) agency actions that are "likely to jeopardize the continued existence" of threatened and endangered species or that would be likely to destroy or adversely modify their critical habitat (16 U.S.C. 1536(a)(2)); and (2) following initiation of consultation, "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)]" (16 U.S.C. 1536(d)).[12] Because of the T&E stipulation, neither of these forbidden agency practices is implicated by the issuance of a lease in the absence of a biological opinion that discusses all aspects of oil and gas development. The

[12] Indeed, by negative implication, Section 7(d)'s command that federal agencies may not make "irreversible or irretrievable commit-

T&E stipulation, in effect, limits the scope of the "agency action" that is subject to Section 7's consultation requirement at the leasing stage.[13]

We nonetheless do not join petitioners in suggesting this Court's review at this time of the ESA issue. The decision of the court of appeals does not squarely conflict with a decision of another court of appeals and, as with the court of appeals' NEPA ruling, the practical importance of the ESA ruling, which is presently uncertain, can be more accurately assessed after the federal respondents in this case have made an effort to comply in good faith with the court of appeals' ruling. Accordingly, this Court's attention is not now required.

Contrary to petitioners' claim (Pet. 18-24), the court of appeals' ESA ruling in this case does not clearly conflict

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ments" of resources pending completion of consultation directly supports the lawfulness of the limited action taken by the agency in this case. The court of appeals' only response to Section 7(d)—that it merely "clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process" and "is not an independent authorization for 'incremental-step' consultation" (Pet. App. A29 n.34)—is unpersuasive. Section 7(d) would be mere surplusage under the court of appeals' view. In our view, the better reading of the provision, which gives meaning to Section 7(d), is that prior to completion of consultation agencies have discretion to take some action not involving "irreversible or irretrievable commitments of resources."

[13] The T&E stipulations provide (Pet. App. A27-A28 (footnote omitted)):

> The Federal surface management agency is responsible for assuring that the leased land is examined prior to undertaking any surface-disturbing activities to determine effects upon any plant

with either the Tenth Circuit's ruling in *Park County* or the District of Columbia Circuit's decisions in *North Slope Borough* v. *Andrus*, 642 F.2d 589 (1980), and *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678 (1982). In *Park County*, the Tenth Circuit did not even reach the ESA issue, apparently because it concluded that the plaintiffs' ESA challenge to the Forest Service's approval of an application for a permit to drill was moot because drilling had been abandoned by the time of the court's consideration of the issue (see 817 F.2d at 613, 614-615). Although the District of Columbia Circuit did reach the ESA issue in both *North Slope Borough* and *Cabinet Mountains Wilderness*, neither of those cases involved onshore leases issued under the Mineral Leasing Act. *Cabinet Mountains Wilderness* involved a plan of operations for exploratory drilling upon unpatented mining claims located under the General Mining Laws (see 685 F.2d at 679; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963)). *North Slope Borough* involved offshore leases under the multiple-stage leasing process mandated by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* (see *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984)), which the court of appeals in this case reasoned had "mitigated the ESA requirement that the biological opinion address all phases of the mineral leasing project" (Pet. App. A30).[14] Although, like the dissent and unlike

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> or animal species, listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be a violation of the [ESA] by detrimentally affecting endangered or threatened species or their habitats.

[14] The court of appeals similarly distinguished its own earlier decision in *Village of False Pass* v. *Clark*, 733 F.2d 605 (9th Cir. 1984), which also involved OCSLA leasing (see Pet. App. A30-A31).

the majority below, we do not believe that these differences in statutory schemes should lead to a difference in the scope of the Secretary's consultation obligations under ESA Section 7 at the leasing stage, we cannot claim that a circuit conflict presently exists on that question—which is the precise question presented here.

Finally, the importance of the ESA issue, like that of the NEPA issue, is not yet certain. The court of appeals held that a biological opinion discussing all aspects of oil and gas development must be prepared "using the best information available" (Pet. App. A25). Because much of the discussion in a comprehensive biological opinion of such scope completed at the leasing stage will necessarily be somewhat speculative, the significance of the court's ruling can be ascertained only after the federal respondents have completed their efforts to prepare such an opinion and the lower courts have had an opportunity to pass upon its adequacy. Should the court of appeals' resolution of the ESA issue ultimately prove to have the unreasonable effect of "telescoping * * * any and every projected hazard to endangered life and to the environment into one overwhelming statutory obstacle" (*North Slope Borough*, 642 F.2d at 609), this Court's review may ultimately be warranted. Because, however, the court of appeals' ruling remains susceptible to more reasoned implementation, further review is not currently required.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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